SUPREME COURT, U. S.

473

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IN THE

Supreme Court of the United States

No. 23,058

SOUTHERN RAMBLER SALES, INC.
Appellant,

versus

AMERICAN MOTORS CORPORATION and
AMERICAN MOTORS SALES CORPORATION,
Appellee.

Appeal from the Court of Appeals for the Fifth Circuit
Honorables Gewin and Goldbert, Circuit Judges, and
Spears, District Judge.

PETITION FOR WRIT OF CERTIORARI

CHARLES A. O'NIELL, JR.
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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Southern Rambler Sales, Inc., with respect shows unto the Honorable Court as follows, to-wit:

1.

Citation to Official Report of Opinion Delivered in the Court Below

The opinion rendered by the Court below is reported in 375 F.2d 932.

2.

Grounds for the Court's Jurisdiction

The decree sought to be reviewed was rendered and entered on April 10, 1967, and rehearing denied on May 8, 1967. The jurisdiction of this Honorable Court is invoked 28 U.S.C.A. 2101 (c).

3.

Questions Presented for Review

a) Did the actions of American Motors Corporation constitute bad faith within the meaning of the Automobile Dealers' Day in Court Act (15 U.S.C.A. 1221-1225)?

b) Is the interpretation given this act by lower courts too narrow in scope so as to render it unenforceable against automobile manufacturers, thus defeating the whole purpose of Congress in passing the act?

c) Does there actually exist an issue as to a material fact in this case that would constitute the granting of a summary judgment in this matter an incorrect ruling?

MAY IT PLEASE THE COURT:

Statement of the Case

Complainant, a local corporation franchised by the defendants as a dealer for the sale and distribution of the automobiles manufactured by the defendants,

brought this action under "The Automobile Dealer Franchise Act of 1956", 15 USCA, Section 1221, et seq.

In its complaint the plaintiff sets out that it was enfranchised as a dealer for the defendants beginning in January, 1958, and continued as such through January, 1960, by annual renewals of the franchise. The complaint charges that the defendants represented to the plaintiff that no competing franchises would be offered to other dealers in the area without first submitting the additional franchise to plaintiff for plaintiff's refusal. Early in the dealings between the parties, this agreement was violated by the defendants and they thereafter entered upon a course of coercive, unfair and inequitable dealing with the plaintiff in the distribution of the defendants' product by delivering to plaintiff slow-moving and unsalable lines of automobiles manufactured by the defendants, and withholding from plaintiff the more readily salable lines; and by delivering these more readily salable items to the plaintiff's competitors.

By May, 1960, this conduct on the part of the defendant had brought the plaintiff to the point of selling its business and an agreement for the sale of the business to Mr. Sam Capaci and Mrs. Willie Cotaya had been reached, and the physical plant of the business had actually been turned over to them for operation.

At that time, it is charged in the complaint ,the defendants, instead of approving the sale of the business and the transfer of the franchise to the purchasers, entered into a direct agreement with these same pur-

chasers, granting them a new franchise and setting them up in a new business, as a result of which they withdrew from the agreement to buy from plaintiff.

As a result, the plaintiff was forced into a liquidation of its business, all resulting in the damages for which it sued.

The defense denies any of the charges made, protests its good faith in all dealings, denies the existence of the agreement not to grant competing franchises and contends that it complied fairly and equitably with all of its obligations under the franchise. Defendants affirmatively alleged that the franchise was voluntarily terminated by the plaintiff in July, 1960.

The deposition of the plaintiff's president and primary stockholder was taken by the defendants and is on file at page 74 of the transcript.

Defendants moved for summary judgment, attaching affidavits and exhibits to the motion, and on April 28, 1965, the court granted the motion, dismissing plaintiff's suit (Tr. p. 281)

Plaintiff moved for a new trial and in connection with this motion, moved for the production of certain documents by the defendants (Tr. pp. 282-287). On August 4, 1965, after hearing, the court denied the motion, and plaintiff appealed from the granting of the motion for summary judgment, and the denial of the motion for a new trial (Tr. p. 315).

On April 10, 1967, the U.S. Ct. of Apps., for the Fifth Circuit affirmed the Trial Court's decision and on May 8, 1967, denied a petition for rehearing of the case.

From the decision of the Court of Appeals, plaintiff now appeals.

Southern's President, Mr. Grady, sued, and used as the basis of his action 15 USCA 1221-1225, "The Automobile Dealer Franchise Act of 1956". Specifically sections 1221 and 1222 state that dealer and manufacturer must at all times maintain good faith in their dealings with each other, free from coercion and intimidation.

It was Grady's contention, in his pleadings and in his deposition, that there was a complete lack of good faith on the part of American in the following ways. American had made oral representations to the effect that they would supply Southern with a fair balanced inventory of salable vehicles. (Tr. pp. 102-105, 144-146, 150 151, 153-154, and 202). Grady claimed he didn't get his share of them, but was loaded up by the factory with unsalable models and parts. Is this the standard of good faith which the act imposes?

American also orally agreed not to issue another franchise in the area without giving Grady the option of first refusal. (Tr. p. 136-137). A new franchise was issued without Grady's knowledge or consent, a franchise which had great effect on his sales by capturing a large slice of Southern's market. Does this constitute good faith?

And when, as a result of these discriminatory practices, Grady finally came to the conclusion that he must sell out and salvage what he could, he found two buyers, Mr. Capaci and Mrs. Cotaya (Tr. p. 178). Agreements were reached, credit was approved, and Capaci and Cotaya even operated the business for two days. Then came the coup de grace which finally broke Grady's back. American went to the two buyers directly and, without Southern's knowledge, undercut them and arranged for the direct purchase of a brand new franchise by the buyers from American, thus, killing any opportunity for Grady to salvage some of his investment. The only thing he could then do was to cancel his franchise and take advantage of the repurchase agreement as set out in the franchise contract (Tr. p. 47) whereby American would buy back from him any unsold new cars in his inventory at the time of cancelling of the franchise. Is this the good faith standard required by the Act?

The admissability of these oral statements to alter what is on the face of a written contract is not an issue here. But admissable they are to establish a pattern of discrimination and calculated effort to bring about the economic demise of Southern. And add to this a written contract which itself is to a great degree favorable only to the manufacturers, not the dealer, and to which a dealer is forced to affix his name if he desires to enter the automobile business at all, and one can clearly observe a pattern of intimidation and coercion which allows the manufacturer to manipulate the dealer and control his actions to any extent he pleases. And cer-

tainly this constitutes what amounts to bad faith as defined in the Act.

Southern does not argue contract law and parol evidence rules. It argues that a seemingly routine contract for a franchise taken together with oral representations made to the dealer are in fact weapons of coercion exonerating the manufacturer from practically any misconduct which might arise in dealings with his franchise holder. Southern argues that the contract taken along with the violations of the oral agreements constitute the bad faith referred to in the act and gives the dealer a right of action and a "day in Court" against the manufacturer. To the extent that the written franchise contract is modified by the Act, this forms the basis of Southern's action.

True, of the few cases decided which were based on this Act, none have held for the dealer. In these cases, even some of the very acts complained of herein were held not to be coercive and in bad faith within the meaning of the act. *Alfieri vs. Willys Motors, Inc.*, E.D. Pa. 1964; 227 F. Supp. 627; *Augusta Rambler Sales, Inc. vs. American Motors Sales Corp.*, N.D. Ga. 1962, 213 F. Supp. 889; *Globe Motors, Inc. vs. Studebaker-Packard Corp.*, 3 Cir. 1964, 328 F. 2d 645; *Garvin vs. American Motors Corp.*, 3 Cir. 1963, 318 F. 2d 518; *Victory Motors of Savannah vs. Chrysler Motors Corp.*, 5 Cir. 1966, 357 F. 2d 429.

But none of the cases contained all of the violations complained of herein. None established a clear pattern of harrassment as can be seen herein.

The very fact that all of these cases were against the dealer points to the reason this Honorable Court should hear this case. With this Act, Congress intended to overcome the distinct advantage possessed by the manufacturer and give the dealer a better bargaining position in his negotiations. The standard of good faith was imposed. The act attempts to eliminate any and all intimidation and coercion. And yet the lower Courts have in all cases interpreted various actions by manufacturers as not being the bad faith referred to in the Act, thus discharging any gains in bargaining power the various dealers thought they might have acquired with the passage of such an Act, Thus on the one hand we have Congress attempting to alleviate a problem and give the dealers some veil of protection from coercion and intimidation, and on the other hand, the Courts are taking away any such protection with their narrow interpretation of the Act and what actually constitutes the bad faith defined therein. We respectfully submit that, thus interpreted, the Act is not achieving the purposes for which it was written, and to this extent, this Honorable Court should consider the intent of Congress in passing the Act and the obviously erroneous interpretation given to it by the Courts. In hearing the matter, the Court can alleviate this problem and re-establish the Act in a prospectus of proper interpretation.

Finally to consider the granting of a summary judgment in this matter, this Honorable Court could rule no other way, but to not allow such a motion. Grady testified at length under oath, as to his knowledge and beliefs concerning American's dealing with him. His deposition was made part of the record (Tr. p. 74-214).

At the hearing on the motion for summary judgment, certain affidavits of representatives of American, namely of Mr. Chalfant and Mr. Daley (Tr. p. 221), denying the existence of any oral agreements and alleging good faith dealings at all times on the part of American were introduced. In granting the summary judgment, the trial judge, as did the Court of Appeals, dismissed Grady's sworn testimony given under cross examination as unbelievable, and embraced the affidavits of American employees as statements of the true situation in this case. What can be more of a "genuine issue as to any material fact" (Rule 56, Federal Rules of Civil Procedure) than the sworn testimony on the one hand contradicted by affidavits on the other. These witnesses too might have been considered to, in the words of the Court, "lack specificity and are suppositious, speculative, conclusory and unfactual" (Opinion of the Fifth Circuit Court of Appeals, p. 9) had they been subjected to extensive cross examination. The Court, in stating that Grady's deposition lacks specificity, etc. violates the cardinal rule in dealing with motions for summary judgment for the court is thereby doing nothing more nor less than balancing the affidavits of Chalfont and Daly against the deposition of Grady and electing to accept the affidavits over the deposition. This is not a function to be performed by the court on a motion for summary judgment. So long as there is a conflict on any material issue of fact, the motion must be denied.

In summary, it is respectfully submitted that because of the *series* of incidences related by Grady under oath, attributable to American, these actions do

indeed constitute the bad faith within the meaning of the "Automobile Dealers Franchise Act of 1956". As a result of the narrow interpretation given by the lower Courts as to what constitutes bad faith on the part of the manufacturer, the purpose for which the act was drawn is defeated and dealers are again at the mercy of the all powerful manufacturer without the protection from coercion and intimidation which Congress intended with this Act to give. And consequently, the dealer is not given his day in Court. And because the lower Court could find no genuine issue as to a material fact when a deposition of record gave direct opposite interpretation of the facts from affidavits admitted in support of a motion for summary judgment, the granting of the said motion was an error of the lower Court and did indeed actually deprive the dealer of his "day in Court."

We respectfully submit that because of the above, the trial and appeals Courts should be overruled on their granting of said motion and this case be remanded to the District Court for trial on the merits.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

CHARLES A. O'NIELL, JR.

SUPREME COURT, U. S.

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APPENDIX A
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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23,058

SOUTHERN RAMBLER SALES, INC.,
Appellant,

versus

AMERICAN MOTORS CORPORATION and
AMERICAN MOTORS SALES CORPORATION,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 10, 1967.)

Before GEWIN and GOLDBERG, Circuit Judges, and SPEARS, District Judge.

GOLDBERG, Circuit Judge: Southern Rambler Sales, Inc. (Rambler) was a New Orleans franchisee of American Motors Corporation and American Motors Sales Corporation (American) from January 1958 until July 1960, when at Rambler's request the franchise was terminated.

In its complaint, Rambler pleaded oral representations by American at the time of the enfranchisement that the latter would grant no competing franchise in Rambler's area without first giving Rambler the right of refusal of these franchises and that competing franchises were granted without so advising Rambler. Rambler further pleaded that it was the victim of discriminatory delivery of automobiles in that American refused to allot to Rambler fast-selling popular models and instead loaded it with unsaleable models, thus weakening Rambler's economic position and forcing it to liquidate its business by piecemeal sales. According to Rambler, moreover, American should have cooperated with it in facilitating the sale by Rambler of its assets to a new American franchisee. Rambler sought in excess of $2,000,000 damages, which apparently arose out of American's (1) general violations of the anti-trust laws, Section 1 of the Sherman Act, 15 USCA §1, and the Clayton Act, 15 USCA §§12-27; (2) interference with the sale of Rambler's franchise dealership; (3) breach of the franchise contract; and (4) violation of the Automobile Dealers' Day in Court Act, 15 USCA 1221-1225.

The deposition of Rambler's president had been taken on September 18, 1963. On April 2, 1965, American filed a motion to dismiss or, alternatively, for summary judgment with two supplementary affidavits. On April 28, 1965, the court granted summary judgment. Rambler thereafter filed a motion for new trial on May 10, 1965, and a motion for production of documents on May 21, 1965, both of which motions were denied.

The causes of action involving (1) anti-trust violations, (2) interference with sale of Rambler's dealership, and (3) breach of contract were abandoned because not pursued by proof or briefed on appeal. See *Iob v. Los Angeles Brewing Company*, 9 Cir. 1950, 183 F.2d 398, 401 and *Sugg v. Hendrix*, 5 Cir. 1946, 153 F.2d 240, 242-43, where, in an action by a truck driver against a construction company for injuries sustained when the driver was caught between his tank truck and defendant's tractor, the court held the defense of failure to exercise reasonable care was abandoned because of lack of argument and evidence.

The only possible cause of action justiciably before us here involves 15 USCA §§1221-1225, commonly known as the Automobile Dealers' Day in Court Act. This case in part tests whether the Automobile Dealers' Day in Court Act gives the dealers anything more than its name implies. More precisely, this suit is bottomed on the failure of American to act in "good faith" as that term is defined in the statute.[1]

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[1]The applicable sections are 1222 and 1221, which provide in pertinent part:

"§1222. Authorization of suits against manufacturers; amount of recovery; defenses

"An automobile dealer may bring suit against any automobile manufacturer . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer. . . ."

"§1221. Definitions as used in this chapter—

"(e) The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion,

The Rambler and American franchise agreement gave to Rambler a nonexclusive franchise, afforded American wide latitude in vehicle allocation, and absolved it from responsibility for failure to deliver and for delays in filling orders.[2] Rambler's theory is that these contractual provisions are modified by the Automobile Dealers' Day in Court Act to the end that contractual rights of American cannot be used to coerce or intimidate Rambler into its economic demise. However valid this theory may be, the beneficent balm of protection succoring automobile dealers un-

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intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith." 15 USCA §§1222 and 1221.

[2]The relevant parts of the Dealer Franchise Provisions reads as follows:

Sec. One: As long as this Franchise Agreement shall remain in effect, Dealer shall have the non-exclusive right to purchase from Zone and resell motor vehicles and Manufacturer's parts and accessories."

Sec. Four: "Zone shall not be liable or responsible in any manner to Dealer for failure or delay to fill any order placed hereunder or for other failures to perform when same is due to or the result of strikes or other labor troubles, fires, floods, material or labor shortages, embargoes, stoppages in transit, direct or indirect acts, regulations or orders of Government, the Zone's allocation of motor vehicles and other products to and among dealers and other customers on such basis as Zone may determine, war, sabotage, acts of God or the public enemy, and other causes beyond the control of the Zone and/or the Manufacturer."

Sec. Eight: "Zone may ship motor vehicles, parts, accessories and other merchandise ordered hereunder by any mean of transportation and from whatever point it may select."

der the Act has been sparingly and sparsely spread. We find no reported case in which a dealer has a court-approved judgment. The statute recognizes that a valid contract can be an engine of oppression, but two aspects of the Act's protection must be considered. First, oral understandings, such as the one sought to be proved by Rambler, which are in conflict with the written franchise agreements are not made enforceable by the Act. In *Alfieri v. Willys Motors, Inc.*, E.D. Pa. 1964, 227 F. Supp. 627, 629, an action under the Act where the dealer alleged, inter alia, that the written franchise agreement had been orally modified to provide an exclusive-dealing arrangement, it was pointed out:

> "A study of the legislative history shows that the use by Congress of the word 'written' in defining the term 'franchise' was not inadvertent but resulted from a careful and deliberate consideration of the entire matter. U. S. Code Cong. and Adm. News 1956, pp. 4596, 4601.
>
> '. . . The words "understanding or arrangement" have been deleted in order to safeguard against the possible inclusion of anti-competitive trade arrangements between the manufacturer and the dealer, such as arrangements which might limit the location of new dealers.'
>
> In view of this it is evident that one of the main objectives of the choice of language by

the Legislature was to guard against such oral understandings or agreements upon which the plaintiff relies."

Here too, Rambler's allegation of such oral representations is not admissible.

Second, in each case arising under the Act, good faith or the lack of it must be determined in the context of "coercion, intimidation, or threats of coercion or intimidation from the other party." It is here that Rambler failed to carry its burden. The focal point of Rambler's complaint is found in its allegations that American, "acting in a coercive, unfair and inequitable manner," discriminated against Rambler with respect to allocation of vehicles thereby leading it to the forced sale of its business.[3]

The statute, it must be noted does not afford Rambler a statutory right or formula for allocation or delivery of certain cars. In *Augusta Rambler Sales, Inc. v. American Motors Sales Corp.*, N.D. Ga. 1962, 213 F.Supp. 889, where a dealer complained under the Act of one of these same defendants' failure to deliver orders and of excessive shipments of automobiles

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[3]Paragraph X of Rambler's complaint is as follows:

"That once having granted these franchises, defendants immediately began acting in a coercive, unfair and inequitable manner, in failing and refusing to furnish complainant with the vehicles that were salable and/or ordered by it, but during the same period did furnish the said type of vehicles to complainants' competition, Bernie Dumas Buick Rambler, Inc., and Colonial Rambler, Inc., all to the detriment of complainant, who was then a recognized, reputable and successful franchise dealer." (R. 9).

of undesirable colors and models, the court held that nothing in the contract obligated American to furnish any number of cars at any particular time and that no prohibitive acts of coercion, intimidation, or threats were thus presented. Similarly, no unfair allocation under the Act is shown where a dealer receives more cars than its competitor during a period of production shortage, *Globe Motors, Inc. v. Studebaker-Packard Corporation*, 3 Cir. 1964, 328 F.2d 645, or where a dealer gets a higher percentage of the cars allotted in his area than he is thereafter expected to sell, *Leach v. Ford Motor Co.*, N.D. Cal. 1960, 189 F.Supp. 340. As pointed out in *Bateman v. Ford Motor Company*, E.D. Pa. 1962, 204 F. Supp. 357, automobile dealers often cannot secure all the fast-moving models they desire, but sometimes receive harder to sell models.

Thus, there being no right to cars of certain color, body, or style, Rambler must demonstrate that degree of bad faith allocation which has coercive and intimidating effects. As the court said in *Globe, supra*, at 648,

> "The question for decision is not whether the appellant acted unfairly or inequitably in its business relations with the appellee; the narrow question is whether the appellant failed to act in 'good faith', as that term is defined by the Act.
>
> "The charge that the appellant discriminated against the appellee and in favor of a

competitor in the allocation of 'Lark' automobiles can be disposed of easily. The only evidence offered in support of the charge was completely lacking in probative value. Against this was the uncontradicted testimony that in each of the weeks, except one, embraced within the period during which there was a shortage of product, the appellee received more cars than did its competitor. If there was discrimination, it favored the appellee."

Finally, the right of a dealer under the Act to an exclusive dealership in his territory has been specifically rejected. In *Globe, supra,* establishment of a competitive dealership ten blocks away was held not to be failure to act in good faith; moreover, the legislative history of the Automobile Dealers' Day in Court Act instructs us that such competitive dealerships were *not* to be considered evidence of bad faith.

"The bill does not freeze present channels or methods of automobile distribution and would not prohibit a manufacturer from appointing an additional dealer in a community provided that the establishment of the new dealer is not a device by the manufacturer to coerce or intimidate an existing dealer. The committee emphasizes that the bill does not afford the dealer the right to be free from competition from additional franchise dealers. Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this

> right could be inconsistent with the antitrust objectives of this legislation. Under the bill, a manufacturer does not guarantee the dealer profitable operation or freedom from depletion of investment." H.R. Rep. No. 2850, 84th Cong. 2d Sess. (1956), 3 U.S. Code Cong. & Adm. News 4596, 4603-04 (1956).

This language was cited with approval in *Garvin v. American Motors Corporation*, 3 Cir. 1963, 318 F.2d 518, where a dealer attempted to prove a violation of the Act by the manufacturer's establishment of a competitive dealership in an area near him. As is also true with the case at bar, the court in *Garvin* pointed out that:

> ". . . the record is completely devoid of any evidence to show that the new dealership was established as a device to coerce Garvin. In the absence of such a showing, plaintiff's argument is without merit." 318 F.2d at 520.

Even the exaction of minimum sales accompanied by threats to establish competitive dealerships has been held not to be coercive per se. *Victory Motors of Savannah v. Chrysler Motors Corp.*, 5 Cir. 1966, 357 F.2d 429. There, the court emphasized that even if Chrysler had established a new dealership, Victory still would have to show that its establishment was coercion or intimidation amounting to bad faith on the part of Chrysler.

With this legal setting, we turn to the summary

judgment aspects of this case. Chronology and the time span are helpful here. The complaint was filed on March 28, 1961. The deposition of Grady, Rambler's president, was taken on September 18, 1963. Grady's answers on deposition lack specificity and are suppositions, speculative, conclusory, and unfactual.

If Rambler suspected American of discrimination or establishing competition of such quality as to amount to bad faith, the underlying facts were not inaccessible. Rambler had from May until August to employ the tools and devices of discovery if the facts were not otherwise discernible but failed to do so.[4] Finally, on April 2, 1965, American moved for summary judgment, supported by the affidavits of Chalfant and

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[4]The trial court gave Rambler every chance to offer countervailing affidavits. Even after the initial decision granting the summary judgment, the following colloquy took palce:

"THE COURT:

What I want you to do, so as to keep the record straight, is to file an application for a new trial, and annex to that application for new trial, and annex to that whatever affidavits you must direct, if you can, and set forth these salient facts that Mr. Moss has argued here today.

MR. TUCKER:

Yes, sir.

THE COURT:

And, after all, we are not running a nursery school here, and we are trying to do our best to do justice, and do what is fair, and I am giving you this additional opportunity to get a rehearing, and we will set it for the next couple of weeks.

MR. TUCKER:

Thank you. Very well.

THE COURT:

And don't forget a supplemental memorandum, also, in support of your affidavits."

Daley, who specifically stated that no representations were made to Rambler with respect to car allocation, that Rambler was never threatened, intimidated, or coerced to do anything, that they were not aware of any peculiar problems had by Rambler in obtaining automobiles which were not common to all dealers and that in fact Rambler received a greater percentage of automobiles than its proportional share as a dealer during each of the model years. Summary judgment was granted on April 28, and only after this grant did Rambler move for permission to discover documents.

The tools and devices of discovery are more than options and opportunities. Rule 56 expressly exacts them by negative compulsion on pain of judicial denouement—saying in effect, "Meet these affidavit facts or judicially die."[5] Diligence in opposing a mo-

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[5]F. R. Civ. P. 56 says in part:

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

"(f) When Affidavits Are Unavailable. Should it appear

tion for summary judgment is required, for such a motion with supporting logistics and gear does not lose its thrust by an opponent's complacence. In *Robin Construction Company v. United States*, 3 Cir. 1965, 345 F.2d 610, 613-14, the Court said:

> ". . . [A] party who resists summary judgment cannot hold back his evidence until the time of trial: [quoting from *Engl v. Aetna Life Ins. Co.*, 2 Cir. 1943, 139 F.2d 469, 473] '. . . [W]e have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment.'
>
> ". . . Indeed, subdivision (f) of Rule 56, by affording an opportunity for continuance of an application for summary judgment so as to permit affidavits to be obtained or depositions to be taken or discovery to be had, indicates that absent such effort it is idle to attempt to shrug off the facts which his adversary has presented."

Accord, *Schenider v. Nickesson and Robbins*, 2 Cir. 1958, 254 F.2d 827; *Berry Brothers Buick, Inc. v. General Motors Corp.*, E.D. Pa. 1966, 257 F. Supp. 542.

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from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Under the circumstances here, Rambler had an obligation to attempt to extract and sequester facts from American. This it sought to do almost a month after the entry of summary judgment by way of a motion to produce. The motion came too late, and the trial court's discretion after the passage of so much time should not be disturbed. In *Englehard Industries, Inc. v. Research Instrumental Corp.*, 9 Cir. 1963, 324 F.2d 347, the Court had before it a summary judgment in which nothing in the record countered the showing by Research that it did not infringe Engelhard's patent but in which Engelhard finally offered controverting affidavits after the motion was granted. In upholding the summary judgment and the trial court's refusal to allow the affidavits, the Court said:

> "On this appeal Engelhard has repeatedly referred to four other affidavits, asserting that they clearly show the existence of material issues of fact, thus manifesting the error of the trial court in rendering summary judgment. The difficulty with this argument is that these affidavits were not filed at or before the time fixed for the hearing on the motion for summary judgment, as required by Fed. F.Civ.P. 56(c). They were tendered after the matter had been decided, with Engelhard's petition for rehearing, and were rejected. Since the petition was addressed to the discretion of the trial court [George P. Converse & Co. v. Polaroid Corp., 242 F.2d 116 (1st Cir. 1957)], Engelhard was obliged to show not only that this evidence was newly

> discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing. But Engelhard made no showing of any kind." *Engelhard, supra,* at 352.

The trial court in the case at bar was more than patient in awaiting Rambler's controverting affidavits or efforts in any direction. It did not abuse its discretion in refusing to order the production of documents by American after summary judgment had been granted. Lawsuits are not timeless or aeonian, and although aging is not an altogether unhappy process, it is not a desirable aspect of judicial proceedings. All things must end—even litigation.

AFFIRMED.

SUPREME COURT, U. S.

SEP 5 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 473

SOUTHERN RAMBLER SALES, INC.,
Petitioner,

versus

AMERICAN MOTORS CORPORATION and
AMERICAN MOTORS SALES CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 375 F. 2d 932.

JURISDICTION

While this Court has discretionary jurisdiction of the application for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit made within 90 days after the entry of the judgment or decree below, re-

spondents submit that said jurisdiction should not be exercised.

QUESTION RAISED

Should this Court review the unanimous judgment below which affirmed the judgment of the District Court dismissing petitioner's action on the grounds that:

(a) no genuine issue of material fact was presented in spite of petitioner's having been afforded every opportunity to support its allegations, and

(b) petitioner could not have made out a case under the Automobile Dealers Day in Court Act in view of the requirement that petitioner prove respondents' lack of good faith, as defined in the Act.

STATEMENT

From January 1958 until July 1960 petitioner was a New Orleans dealer for automobiles manufactured and sold or distributed by respondents. Near the middle of its third year of unsuccessful operation petitioner's franchise was terminated at its own request.

Petitioner filed this action seeking to recover for damages which allegedly resulted from respondents' breach of contract, interference with the sale of petitioner's dealership, violation of the Sherman and Clayton Acts, and violation of the Automobile Dealers Day in Court Act. Respondents denied all allegations.

It is apparent from petitioner's brief and from the opinion of the Court of Appeals for the Fifth Circuit that petitioner has abandoned all of its causes of action except

the one asserted under the Automobile Dealers Day in Court Act, 15 U.S.C.A. §§ 1221-25.

The District Court granted a motion for summary judgment filed by respondents based on a record containing respondents' supporting affidavits and an extensive deposition of petitioner's president and principal stockholder. Thereafter petitioner moved for a new trial and for production of documents, but both motions were denied.

Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit resulted in a decree affirming the judgment of the District Court, and a rehearing was denied.

ARGUMENT

The petition for certiorari fails to focus on any issue justifying consideration by this Court. Petitioner has cited no authority to support its contention that the decisions of the courts below were erroneous. Neither are the issues presented unique or of great importance to the general public. As even petitioner's brief emphasizes, there are no conflicting decisions of appellate or trial courts involving the Automobile Dealers Day in Court Act.

In the absence of special and important reasons for granting certiorari in this matter, there is no occasion for the writ to be granted. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387 (1923); Rule 19, United States Supreme Court.

Petitioner cannot be heard to contend that it did not have every reasonable opportunity to come forward with proof. The opinion of the Court of Appeals clearly demon-

strates that petitioner sought no discovery until after the District Court had rendered its judgment of dismissal, four years after the action had been filed. Moreover, the testimony of petitioner's president and principal stockholder was aptly characterized by the Court of Appeals as "suppositious, speculative, conclusory and unfactual". 375 F. 2d at 936. Thus, no issue of credibility was presented. The facts before the District Court were undisputed.

The courts below were eminently correct in concluding that no quantity of evidence adduced by petitioner to support its complaint could have made out a case under the Automobile Dealers Day in Court Act. Proof of alleged oral representations by respondents would have been required. Petitioner shrewdly suggests in brief that it depended upon a "series of incidences" as proof of bad faith under the Act, and that it did not seek to prove oral representations for the purpose of varying or contradicting the written franchise agreement between the parties. However, the Court of Appeals properly held that, aside from the proscriptions of parol evidence rules, oral understandings such as those sought to be proved by petitioner which conflict with written franchise provisions are rendered unenforceable by the Act.

Petitioner argues that courts have defeated the purpose of Congress in passing the Act, yet the legislative history of the Act itself establishes that Congress intended to prevent reliance by a dealer upon oral understandings like those asserted by petitioner in attempting to prove lack of good faith under the Act. 3 U.S. Code Cong. & Adm. News, 4596, 4601, 4603-04. Even if petitioner could have proved that respondents orally promised an exclusive dealership but set up additional dealers, or promised a

certain allocation of vehicles but failed to perform as agreed, this is not actionable.

Under the Automobile Dealers Day in Court Act whether a manufacturer has acted in good faith must be determined in the context of coercion, intimidation, or threats of coercion or intimidation. 15 U.S.C.A. § 1221. Unless a plaintiff can show that a new dealership was established as a device to coerce him, he cannot recover. *Garvin v. American Motors Corporation*, 318 F. 2d 518 (3d Cir. 1963); *Victory Motors of Savannah v. Chrysler Motors Corp.*, 357 F. 2d 429 (5th Cir. 1966). Establishment of a competitive dealership only ten blocks away has been held not a failure to act in good faith. *Globe Motors, Inc. v. Studebaker-Packard Corporation*, 328 F. 2d 645 (3d Cir. 1964).

Just as the Act does not guarantee petitioner freedom from competition, it affords petitioner no statutory right or formula for allocation of automobiles. *Globe Motors, Inc. v. Studebaker-Packard Corporation, supra; Augusta Rambler Sales, Inc. v. American Motors Sales Corporation*, 213 F. Supp. 889 (N.D. Ga. 1962); *Bateman v. Ford Motor Company*, 204 F. Supp. 357 (E.D. Pa. 1962); *Leach v. Ford Motor Co.*, 189 F. Supp. 349 (N.D. Cal. 1960).

In *Woodard v. General Motors Corporation*, 298 F. 2d 121 (5th Cir. 1962), *cert. denied*, 369 U.S. 887, *reh. denied*, 370 U.S. 965, the Fifth Circuit Court declared:

> "By the statutory definition, 'good faith' is restricted to a duty to act in a fair and equitable manner so as to guarantee freedom from coercion, intimidation or threats. The plain meaning construction of the definition would give to a dealer a cause of action only if the acts of the dealer [sic]

are not fair and equitable and are coercive. The legislative history supports this construction. In the report of the Committee on the Judiciary of the House of Representatives it is said:

> " 'The principal effect of the bill as amended by the committee is to give the dealer a right of action against the manufacturer, where the manufacturer fails to act in a fair and equitable manner so as to guarantee the dealer freedom from coercion, intimidation or threats of coercion or intimidation. The term 'fair and equitable' as used in the bill is qualified by the term 'so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party.' In each case arising under this bill, good faith must be determined in the context of coercion or intimidation or threats of coercion or intimidation.' H. R. Rep. No. 2580, 84th Cong. 2d Sess. 9.
>
> "Judicial construction has applied the context of coercion doctrine in determining good faith." 298 F. 2d at 127.

Accord, Pierce Ford Sales, Inc. v. Ford Motor Company, 299 F. 2d 425 (2d Cir. 1962), *cert. denied*, 371 U.S. 829; *Milos v. Ford Motor Company*, 317 F. 2d 712, 716 (3d Cir. 1963), *cert. denied*, 375 U.S. 896.

This Court has heretofore considered the issues raised by this petition. Petitioner's complaint alleged that it acted not through coercion but in order to effectively fulfill its contractual commitments. Petitioner failed to produce facts to establish coercion or intimidation, and could not have done so. Such inability to make out a case does not result from improper judicial construction of the Act but from the application of the Act as Congress intended it.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents, American Motors Corporation and American Motors Sales Corporation.

CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

New Orleans, Louisiana, September 1, 1967.

C. MURPHY MOSS, JR.